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R. v. Haevischer

2014 BCSC 2172

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2014 BCSC 2172 R. v. Haevischer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Haevischer,

2014 BCSC 2172

Date: 20141119

Docket: X072945-B

Registry: New Westminster

Regina

v.

Cody Rae Haevischer and Matthew James Johnston

Before: The Honourable Madam Justice Wedge

Ruling re: Stay of Proceedings

(Crown's Vukelich Application)

Counsel for the Crown:

M.K. Levitz, Q.C.

C.G. Baragar

L.J. Kenworthy

Counsel for the Accused Haevischer:

D. Dlab

Counsel for the Accused Johnston:

B.A. Martland

J.P.R. Desbarats

Counsel for Amici:

A.K. Kapoor

L.E. Trevelyan

Place and Date of Hearing:

Vancouver, B.C.

October 27-31, 2014

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Place and Date of Judgment:

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I. INTRODUCTION

- [1] On October 2, 2014, the Applicants, Cody Haevischer and Matthew Johnston, were convicted of six counts of first degree murder and one count of conspiracy to commit murder in relation to the murders of the "Surrey Six". Those verdicts have yet to be entered as each Applicant seeks a judicial stay of proceedings for abuse of process arising from both systemic police misconduct during the investigation, and inhumane conditions of confinement while on remand.
- [2] Both Applicants acknowledge that the test for a judicial stay is a demanding one that is not easily met, particularly so in this case given this Court's conclusions regarding their roles in the murders. Nevertheless, they maintain that the confluence of state misconduct in this case moves it into the rarified terrain of the exceptional case that justifies a stay. Accordingly, they say that they should be permitted to proceed to a full evidentiary hearing to make their case.

- [3] The Crown responds that the stay applications ought to be summarily dismissed as the Applicants have failed to establish that an evidentiary hearing will assist the Court in determining the merits of the applications. This is because, even assuming that all of the allegations of state misconduct were to be proven, a stay of proceedings would be a grossly disproportionate response to the misconduct in this case.
- [4] A portion of this Vukelich application was held in camera and ex parte the Applicants. Amici curiae were appointed to assist the Court by providing an adversarial context to that aspect of the hearing and addressing information disclosed to them on Application 65 that might augment or aggregate the Applicants' assertion of abusive conduct by the police in the course of the investigation. Application 65 arose from Crown resistance to disclosure on the grounds of informer privilege. It ultimately resulted in the exclusion of the evidence of Person X from the trial of the Applicants.

II. GOVERNING LEGAL PRINCIPLES

A. Threshold Requirements

- [5] It has long been recognized that in order for the justice system to operate effectively and efficiently, trial judges must have some ability to control the course of proceedings before them: see, for example, *R. v. Pires*, 2005 SCC 66 at para. 35. One such mechanism is the discretion to decline to embark upon an evidentiary hearing at the request of a party unless satisfied that it will assist in the "proper trial of the real issues": *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.).
- [6] Thus, the question on this application is whether an evidentiary hearing will assist the Court in deciding whether the Applicants are entitled to the remedy they seek. More specifically, the question is whether the Applicants have demonstrated that the alleged police misconduct during the investigation into the Surrey Six murders, together with the conditions of their pretrial confinement during their first 14 months in custody, could entitle them to a judicial stay of their convictions: *R. v. Armstrong*, 2012 BCCA 242 at para. 22.
- [7] In *R. v. Wilder*, 2004 BCSC 304, Romilly J. discussed the threshold test for an evidentiary hearing on an application such as this. He observed at para. 31 that if it is apparent to the Court that the facts as alleged by the defence do not disclose a Charter violation, the application may be dismissed without the hearing of the evidence. In support of this proposition, Romilly J. cited *R. v. Hamill* (1984), 14 C.C.C. (3d) 338 (B.C.C.A.), *aff'd* on other grounds 33 C.C.C. (3d) 110 (S.C.C.), where Esson J.A. said the following at pp. 366-67:

In those cases where the accused does apply to exclude the evidence, it will be for the trial judge to decide what procedure should be followed but, at the least, counsel for the accused should be required to state with reasonable particularity the ground upon which the application for exclusion is made. That much is essential for an orderly trial of the issue. It follows that, if the statement of grounds does not disclose a basis upon which the court could make an order excluding the evidence, the application may be dismissed without hearing evidence.

(This passage from Hamill was also quoted in Vukelich itself.)

[8] Justice Romilly went on to observe (at para. 32) that the decision in Vukelich illustrated the principle stated in Hamill:

In that case, the accused sought to challenge the validity of a search warrant by alleging that certain portions of the supporting affidavit contained false or misleading information. The court held that there was no need for a voir dire to determine this issue because even if the defence's allegations were true and the offending portions of the affidavit were expunged, there remained sufficient information in the affidavit to support the warrant. In other words, a voir dire was unnecessary since no Charter remedy could result even if the defence's case was taken at its highest.

[9] As authorities such as Wilder and Armstrong make clear, the Court must assume for the purposes of the present application that the facts as alleged by the Applicants are true. Having done that, if satisfied that the grounds advanced by the Applicants could not support a stay of proceedings, the Court may dismiss the applications without hearing evidence.

[10] I therefore turn next to the legal principles governing a stay of proceedings for abuse of process, as they set the parameters of the hearing upon which the Applicants wish to embark.

B. Stay of Proceedings for Abuse of Process: The "Residual Category"

[11] R. v. Babos, 2014 SCC 16, is a recent decision in which the Supreme Court clarified the analysis to be undertaken when a stay of proceedings is sought for state conduct that is said to impinge on the integrity of the justice system -- frequently referred to as the "residual" category. (The "main" category refers to state conduct that comprises trial fairness.) Both Applicants base their applications for a stay of proceedings solely on the residual category.

[12] As Moldaver J., writing for the Court, observed, a stay of proceedings is the most drastic remedy a criminal court can order. It permanently halts the prosecution of an accused with the consequence that "the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits" (para. 30). Nevertheless, there are rare occasions, in "the clearest of cases", when a stay for abuse of process will be warranted.

[13] Whether a stay of proceedings is warranted for an abuse of process in either category is determined by three requirements as set out at para. 32:

1. There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (Regan, at para. 54);
2. There must be no alternative remedy capable of redressing the prejudice; and
3. Where there is still uncertainty over whether a stay is warranted after steps 1) and 2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (ibid., at para. 57).

[14] Both the Applicants and the Crown are agreed that this is the legal framework for determining whether a stay of proceedings is warranted in the present case.

[15] I will briefly review Moldaver J.'s comments regarding these three requirements as they relate to the residual category.

i. The first stage: Preventing ongoing harm to the justice system

[16] The question that arises at the first stage of the test is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency such that proceeding with a trial -- even a fair one -- in the face of that conduct would be harmful to the integrity of the justice system (at para. 35).

[17] Justice Moldaver emphasized that the first stage reflects the fact that a stay of proceedings is a prospective rather than a retroactive remedy. In support of this proposition, he cited (at para. 36) an earlier decision of the Court in Canada (Minister of Citizenship and Immigration) v. Tobiass, [1997] 3 S.C.R. 39:

For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. Ordinarily, the latter condition will not be met unless the former is as well -- society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively rare. [para. 91].

[18] With respect to the prospective nature of a stay, Moldaver J. also referred to R. v. Regan, 2002 SCC 12, where the Court stated (at para. 54) that,

[a] stay of proceedings does not merely redress a past wrong. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole, in the future.

[19] Justice Moldaver ultimately framed the question to be answered at the first stage as whether proceeding in light of the impugned conduct would do further harm to the integrity of the justice system. He added (at para. 38):

While I do not question the distinction between ongoing and past misconduct, it does not completely resolve the question of whether carrying on with a trial occasions further harm to the justice system. The court must still consider whether proceeding would lend judicial condonation to the impugned conduct.

ii. The second stage: Alternate remedies

[20] The question at this stage is whether any other remedy short of a stay is capable of redressing the prejudice. Where, as here, the residual category is invoked and the prejudice complained of is prejudice to the integrity of the justice system, any remedy must be directed towards that harm. As Moldaver J. explained (at para. 39):

It must be remembered that for those cases which fall solely within the residual category, the goal is not to provide redress to an accused for a wrong that has been done to him or her in the past. Instead, the focus is on whether an alternative remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward.

iii. The third stage: Balancing

[21] The third stage, balancing, is particularly important when the residual category is invoked. Justice Moldaver said the following in this regard at para. 41:

Where prejudice to the integrity of the justice system is alleged, the court is asked to decide which of two options better protects the integrity of the system: staying the proceedings, or having a trial despite the impugned conduct. This inquiry necessarily demands balancing.

[22] Justice Moldaver described the various factors the court must consider when engaging in the balancing, which include: the nature and seriousness of the misconduct; whether the misconduct is isolated or reflects a systemic or ongoing problem; the circumstances of the accused; the seriousness of the charges the accused faces; and the interests of society in having the charges dealt with on their merits. Justice Moldaver went on to say (at para. 41):

Clearly, the more egregious the state conduct, the greater the need for the court to dissociate itself from it. When the conduct in question shocks the community's conscience and/or offends its sense of fair play and decency, it becomes less likely that society's interest in a full trial on the merits will prevail in the balancing process. But in residual category cases, balance must always be considered.

[23] Justice Moldaver reiterated at para. 44 that the "clearest of cases" threshold, together with the balancing of societal interests that must take place at the third stage, presents an applicant seeking a stay under the residual category with an "onerous burden". He continued:

Indeed, in the residual category, cases warranting a stay of proceedings will be "exceptional" and "very rare" (Tobiass, at para. 91). But this is as it should be. It is only where the "affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases" that a stay of proceedings will be warranted (R. v. Conway, [1989] 1 S.C.R. 1659, at p. 1667).

- [24] In short, the third stage balancing requires to Court to ask the following question: is the seriousness of the state misconduct disproportionate to the societal interest in the effective prosecution of the criminal offence(s) in question? Put another way, which of two options better protects the integrity of the justice system: staying the proceedings or having the criminal charges decided on their merits?
- [25] The weight to be attached to the various factors, including the seriousness of the offences, is a matter for the trial judge to determine in the context of the circumstances before the court in any given case: R. v. S.B., 2014 ONCA 527.
- [26] In Babos, Moldaver J. emphasized the nature of the charges facing the appellants -- 22 charges concerning firearms, illegal drugs and organized crime -- in the balancing phase of the analysis. According to Moldaver J., given the seriousness of the offences, society had "a profound interest in seeing justice done by having the guilt or innocence of the appellants determined through a full trial on the merits" (at para. 69). When the misconduct -- threats uttered by a Crown counsel no longer on the case a year before the trial -- was weighed against society's interest in a trial, the case was not one where the exceptional remedy of a stay was warranted.

III. STATE MISCONDUCT AS ALLEGED BY THE APPLICANTS

- [27] The state misconduct alleged by the Applicants falls into two general categories: first, systemic misconduct by the police in the course of investigating the Surrey Six murders; and, second, harsh and inhumane conditions of confinement upon arrest. The second category is essentially a subset of the first, as the allegation is that the Applicants' custodial circumstances were improperly directed by the police for investigative purposes, and thus also a further incidence of police misconduct.
- [28] I have already noted that for purposes of this Vukelich application, the law requires that I accept as true the facts alleged by the Applicants. The following are the alleged particulars of state misconduct the Applicants submit establish a footing for this Court to conclude that an evidentiary hearing will be of assistance in determining whether they are entitled to a judicial stay.

A. Police Conduct During the Investigation

- i. Aggressive and unorthodox investigative tactics

- [29] The Applicants submit that in its desperation to gather evidence in this very high-profile case, the Surrey Six investigation (Project E-Peseta) adopted an extremely aggressive investigative strategy known as "moving witnesses". This strategy, they say, employed unorthodox measures and ignored the ordinary ground rules for an investigation as set out in the Integrated Homicide Investigation Team's own "Business Rules and Protocol".
- [30] The impetus driving the adoption of the moving witnesses strategy, and its rationale, was described in a will say statement of retired Insp. Don Adam of the RCMP dated September 19, 2010. Insp. Adam had been asked to describe the plan at the request of the team that was then investigating the alleged misconduct of Sgt. Derek Brassington, S/Sgt. Dave Attew and other E-Peseta members (to be discussed below); the will say was the result of that request.
- [31] Insp. Adam described the state of the investigation as at January 2009, some 14 months after the murders had been committed. In his view, the investigation had not been properly resourced or supported, and file management was in disarray. While it was clear from the evidence gathered in the file that the Red Scorpions ("RS") were responsible for the murders, it was equally clear that those who could give evidence would be either participants or people closely associated to them, all of whom were hostile to the police. Insp. Adam explained that a list of RS members and associates was compiled and subdivided into categories, with different plans of action crafted for each. Of particular interest were female associates of the participants, as there was a high likelihood they might have seen or heard things directly. As Insp. Adam stated, the investigation did not need sources but witnesses who could testify about the perpetrators of the murders either through direct knowledge of events or discussions with the perpetrators.

- [32] Insp. Adam described the resulting strategy, in part, as follows:

The term coined, "Moving Witnesses", refers to our efforts to move criminals and their associates from loyalty to their group to loyalty to the RCMP and the bringing of the perpetrators to justice through their truthful testimony. This exercise was much more akin to the structured development of an agent than any traditional witness interview. It is called moving witnesses for the lack of a more appropriate description.

The investigators primarily led by S/Sgt. Attew (the most skilled officer on the file), worked in a structured way to find, or create fractures in the Red Scorpion's cohesiveness. Officers would either create stress in a variety of ways or take advantage of opportunities when the targets were under stress, then present themselves in the most reasonable and empathetic manner possible.

As the investigators worked to dismantle the inner relationships within the Red Scorpions they were required to replace those relationships by building ties between the potential witness and themselves.

It was entirely insufficient to simply obtain a statement from one of these persons and believe they would someday appear in court to testify accurately. In dismantling their lives in the gang we were required to rebuild them lives which would sustain their willingness to assist justice. This called for the investigators to develop close relationships with the witnesses, engaging with activities with them.

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The witnesses thus developed were by and large required to relocate alone. They proved unable to effectively recreate lives for themselves. They required near constant attention/support. Epeseta had anticipated this problem and created a team of specialists to address it in conjunction with Source Witness Protection.

- [33] Insp. Adam described S/Sgt. Attew and Sgt. Brassington as the lynchpins of this strategic approach. He further indicated that police recognized that the strategy would come under attack by defence counsel.
- [34] Insp. Adam's statement reflects a document entitled "Moving Witnesses" (dated October 7, 2009) which formed the basis for discussion among the E-Peseta investigators about the strategy. It is apparent from the document that the strategy was to target those members of the RS who might be vulnerable, such as girlfriends, and play to their needs and weaknesses (their need to belong, damaged childhoods, insecurities, and addictions) and how they might be "impressed by the right cop" if he had the right props, clothes and vehicle. The document referred to "creating events in their world" designed to stress and isolate these individuals, and to sow distrust and dissention with the goal of putting them in a position where they would be willing to turn to the "decent cop" for help. The police would develop the relationships and then provide them with the resources to survive as cooperating witnesses. The document outlined possible approaches and strategies for engaging with these vulnerable gang-affiliated individuals. The overarching objective was to dismantle their relationships within the RS and replace them with new relationships with the police.
- [35] Mr. Haevischer alleges that the police employed an investigative strategy of manipulating and pressuring witnesses and potential witnesses (which included the Applicants and their former co-accused) with the goal of extracting from them information in support of the police theory that the accused had committed the offences. He says that this strategy, articulated in the Moving Witnesses document, included isolating the accused by directing their conditions of confinement so as to make them particularly vulnerable (to be discussed further below).
- [36] Mr. Haevischer gives the example of G.M. as a prospective witness who was subjected to the coercive tactics of the police. G.M. gave a number of statements to the police. He told the police that he had had gone to the Balmoral Tower after the murders and had seen the bodies of the six victims. However, he later retracted his statement, saying that it was not true. According to the Crown's will say of its interview with G.M. in February 2013:

[G.M.] advised that the reason he said in his statements that he saw the bodies was that he believed that the tone of interviewing officers, and his perception of their apparent disbelief in him, was such that it was creating pressure on him to provide information that he felt they wanted to hear. He felt the interviewing police wanted him to say that he had seen the bodies and, as he wanted the interviews to end, he provided the descriptions that he did.

The police had interviewed G.M. at least 20 times.

[37] Mr. Haevischer thus submits that false statements were a result of the coercive tactics of the police.

ii. Alleged Criminal Misconduct of Four Investigating Officers

[38] The Applicants allege that in the course of discharging their responsibilities as investigators and witness handlers, and presumably encouraged by the highly manipulative moving witnesses strategy, senior members of the investigative team engaged in exploitative sexual relationships with two female protected witnesses close to the heart of the investigation.

[39] Sgt. Brassington, a lead E-Peseta investigator, was charged with ensuring the safety of one of the women. He had a sexual relationship with her for a period of several months commencing in June 2009, and began the relationship before the witness had provided her statement to the police concerning the E-Peseta investigation.

[40] S/Sgt. Attew was, at the time, Sgt. Brassington's immediate superior and investigative partner. S/Sgt. Attew learned of the relationship between Sgt. Brassington and the witness, but instead of putting an end to it or reporting the misconduct to his supervisor, he condoned and participated in it. During a weekend in November 2009, he partied with Sgt. Brassington and the witness, and engaged in sexual activity with a friend of hers.

[41] S/Sgt. Attew also had sexual contact with the second of the two female protected Crown witnesses.

[42] In approximately March 2009, S/Sgt. Attew was reported to have made inappropriate overtures to an unrelated civilian female at a bar in Whistler. The woman later complained of the conduct, indicating that S/Sgt. Attew told her he was an undercover police officer investigating the Surrey Six murders, staying at a high-end hotel at Whistler and snowboarding with gang members in order to target them. Supt. John Robin spoke to S/Sgt. Attew about his lack of maturity and leadership, but did not take the matter further.

[43] In a similar vein, Sgt. Brassington was reported in June 2010 to have told a woman in a hot tub at a gym that he was a Surrey Six investigator, had made a lot of money from the overtime he worked on the investigation, and that he had had an affair with a witness in the case.

- [44] Cpl. Paul Johnston and Cpl. Danny Michaud were investigators under the supervision of Sgt. Brassington and S/Sgt. Attew. They were aware of Sgt. Brassington's relationship but took no action. Both engaged in sexual activities with the witness under Sgt. Brassington's protection.
- [45] All four officers made false statements to their commanding officers about their misconduct. Both Sgt. Brassington and S/Sgt. Attew submitted false overtime and expense claims.
- [46] Superintendent Robin, who oversaw the Surrey Six investigation, learned of Sgt. Brassington's relationship with the witness in early December 2009. At that time, Supt. Robin directed that Sgt. Brassington have no further contact with the witness but he did not take immediate further steps to learn the extent of the misconduct or suspend Sgt. Brassington.
- [47] The four officers were ultimately suspended from all RCMP duties and removed from any further involvement in the E-Peseta investigation in 2010. They currently face criminal charges arising from their conduct, including breach of trust, obstruction of justice and fraud.

B. Other Alleged Police Conduct in the Course of the Investigation

i. Mishandling sensitive and protected witnesses/agents/informers

- [48] In addition to inappropriate sexual contact with the two protected witnesses, the Applicants say that S/Sgt. Attew and Sgt. Brassington also endangered the safety of the two women by improperly revealing their whereabouts to other persons in contravention of RCMP protocol.
- [49] The Applicants further point to what they say was the improper handling of informants. The first instance relates to an individual who the police treated as a confidential informant; however, this Court later ruled that the individual was not in fact an informant (*R. v. Bacon*, 2012 BCSC 1113). The second instance relates to a matter regarding which the Amici made submissions on this application in camera.
- [50] The Applicants are critical of the police's approach to Person Y, a Crown witness and police agent who testified at the trial of the Applicants. Despite a June 2008 order of the Court of Appeal that Person Y be retried on a murder charge, the police did not arrest him and Person Y was never taken into custody. Police also assisted Person Y in obtaining a passport despite the fact that he was a key Crown witness and had agreed to plead guilty to two unrelated murder charges. The passport allowed Person Y to travel to Mexico and Brazil where he was beyond the reach of Canadian authorities had he chosen not to continue to cooperate. Having created the risk that Person Y might not return, police investigators travelled to Mexico to spend time with Person Y and engage in recreational activities with him, at considerable public expense, in an effort to ensure his return to Canada.

ii. Lost evidence

[51] The four criminally charged officers had disclosure material on their computer hard drives. The Applicants raise the spectre of lost evidence resulting from the suspensions of the officers in light of the failure to immediately secure all material in their possession. As an example of apparent lost evidence, Person X gave a statement in June 2012 that he had previously provided information to S/Sgt. Attew and Cpl. Johnston about a plot to kill Person Y. There is no evidence, however, of either officer providing this information, and Person X speculated that it fell through the cracks when they were suspended.

iii. Failing to preserve the integrity and secrecy of holdback evidence

[52] In serious crime investigations, the police often preserve "holdback evidence", information known only to a select few, including the perpetrator of the offence. The description and use of such evidence is contained in the RCMP's "E" Division Operational Manual, which states, at page 1, that access to and knowledge of such evidence "must be strictly controlled and limited to those members of the investigative team who need to know". According to the Manual, the handling of holdback evidence is ultimately the responsibility of the team commander.

[53] In the present case, investigators compiled detailed PowerPoint presentations, some running into hundreds of pages, setting out information the investigation had gathered and the theory of the police. These presentations were shown to potential witnesses associated to the RS; thus, say the Applicants, a substantial volume of detailed and sensitive information was released into the pool of potential witnesses. This strategy had the consequence of depriving the police, the Applicants and the Court of uncontaminated evidence from key witnesses.

iv. Influencing witness accounts

[54] The Applicants allege that the police influenced witness accounts. They provide the following example.

[55] In February 2009, shortly before Person X gave his first statement to the police about the Surrey Six murders, Sgt. Brassington and Insp. Adam met with his girlfriend. They suggested to her that Person X might want to explain that "sometimes it can be, you know, do what I say or else", and indicated that such thinking was important and something the police were interested in knowing. Soon thereafter, Person X gave the police an explanation of that kind for the events leading up to the murders. The Applicants say this is an example of the police signalling to Person X how he could mitigate his involvement in the offences.

v. Financial and management problems

[56] Aside from the financial fraud committed by the four criminally charged officers, the Applicants say that there was mismanagement of funds related to key witnesses. For instance, \$180,000 worth of benefits did not appear in the accounting to the Court of expenditures made to and on behalf of Person Y, an important witness at the Applicants' trial. The Applicants further say that it appears there has been no comprehensive audit or

accounting of funds expended in relation to the E-Peseta investigation, which is surprising given the backdrop of criminal charges arising from financial improprieties by investigating officers.

[57] The Applicants indicate that file management, case management and support for the E-Peseta investigation have been the subject of criticism by various reviewing officers. Three reviews were completed. The first was authored by Insp. Kevin MacLeod in July 2008; the second by Cpl. Dave Teboul in October 2008; the third by S/Sgt. Armin Teitz and a review team in 2011. The reviews identified a number of problems, including:

- failure to retain internal email communications;
- a dysfunctional command triangle resulting from flawed staffing decisions;
- an under-resourced investigation;
- serious personality issues among the officers and absence of strong leadership;
- lack of coordination and strained relationship between IHIT and IGTF (Integrated Gang Task Force);
- a "high-school", clique-ish culture under S/Sgt. Attew;
- challenges in addressing contentious issues relating to the use of informants; and
- inadequate financial controls in areas such as sensitive expenditures.

C. Conditions of Confinement

[58] Notwithstanding all of the foregoing, the Applicants allege that the most troubling manifestation of police misconduct in this case was E-Peseta's interference in directing their custodial circumstances following their arrests. They say that the police exceeded their proper role by punitively requiring the Applicants to be housed in solitary confinement for 14 months in harsh and inhumane conditions contrary to the Charter and to international human rights treaties to which Canada is a signatory. Mr. Haevischer in particular describes the police involvement in this regard as an aspect of their overall coercive investigative approach and submits that "the RCMP had an investigative purpose in keeping [him] isolated from the rest of the world to break him down, make him more vulnerable for police interviews, and to prevent him from talking to friends who could be potential witnesses." The Applicants additionally submit that B.C. Corrections officials inappropriately bowed to this pressure from the police and failed in their duty to keep the Applicants safe while in their custody.

[59] The Applicants contend that E-Peseta officers were well aware of the deleterious effects of solitary confinement from their ongoing involvement with Person X and Person Y during the period the Applicants were in segregation. Person X, for example, began to psychologically deteriorate after his placement in segregation for just one month. Whereas the police went to great lengths to ameliorate his conditions of confinement, they took no such steps in relation to the Applicants.

i. Applicants' Conditions of Confinement

(a) Mr. Haevischer

[60] Mr. Haevischer was arrested on April 3, 2009. He remained in RCMP custody until April 6 when he was admitted into the Surrey Pre-trial Services Centre. Mr. Haevischer was immediately placed in segregation on the basis that he was a "suspected gang member" and a "high profile" inmate. A Separate Confinement Notification dated April 9 advised him of the following:

Mr. Haevischer, you have been highlighted in the local media over the last few days as a prominent person in a gang involved in violence.

In order to ensure that other inmates do not attempt to get involved in gang violence by attempting to harm you we are keeping you in separate housing under section 17.

[61] Another seven Separate Confinement Notification forms that run until July 27, 2009 were filed on the application; they say largely the same.

[62] Mr. Haevischer remained in segregation for the four months he was at Surrey Pre-trial. He was moved between cells in the segregation unit, most of which were filthy with mucous, feces and blood smeared on the walls and floors. The cells were very cold, and the bedding was inadequate to keep him warm. He did not have a television in his cell, leaving him with nothing to do other than stare at the walls, write letters and read the occasional book that had been left behind. Mr. Haevischer was confined to his cell for 23 hours a day. The timing of his one hour out was random. During that one hour, he had to exercise, shower, speak with his lawyer and arrange for clean clothing.

[63] Unlike other inmates housed in segregation, Mr. Haevischer was denied all telephone access and visits with anyone other than his legal counsel, as Surrey Pre-trial officials believed "on reasonable grounds that non-privileged legal visits may endanger the inmate or another person". Mr. Haevischer's phone calls to his counsel were in an open area which was loud and had no facilities for taking notes. Of particular concern to Mr. Haevischer was the fact that he was deprived of contact with his young daughter and stepfather. Following a lengthy meeting with the RCMP on June 13, Mr. Haevischer was finally permitted phone contact with his daughter. Subsequently, he was permitted visits from his stepfather (who lived on Vancouver Island), but not telephone contact.

- [64] Mr. Haevischer's only contact with other family and friends was through the mail. However, his mail was held up by B.C. Corrections for weeks at a time.
- [65] On July 24, 2009, Mr. Haevischer was transferred to Vancouver Island Regional Correctional Centre [VIRCC] where he remained in segregation. Many of the previous restrictions remained in place. He was only permitted visits from his counsel, daughter and stepfather. He was only permitted phone contact with his counsel and his daughter.
- [66] For the first month after his arrival at VIRCC, Mr. Haevischer was housed in a special observation cell with a glass wall that permitted other inmates to see inside. He was subsequently moved to another cell though he remained in separate confinement. He was given two 50 to 60 minute periods outside his cell each day which he spent alone. As the months passed, B.C. Corrections officials started allowing Mr. Haevischer to receive additional visitors and to have some limited contact with selected inmates.
- [67] On June 9, 2010, McEwan J. released his judgment on Mr. Bacon's habeas corpus application: *Bacon v. Surrey Pretrial Services Centre (Warden)*, 2010 BCSC 805 [the "Bacon judgment"]. Mr. Haevischer was moved to general population the following day.
- [68] Mr. Haevischer was not passive about his circumstances and submitted numerous complaints and requests for information with the institutional authorities over the many months he was in segregation. Over 30 of the forms were filed on this application, and include many requests for information about the rationale for his limited phone calls and visits, and for his extremely restrictive custodial conditions. The responses provided to Mr. Haevischer were generally along the lines that the reasons for the restrictions had been provided in writing at the time they were imposed, and that his placement was the result of the nature of his charges and his status. Mr. Haevischer's counsel also wrote to the institutional authorities on numerous occasions seeking an explanation for his restrictive conditions.
- [69] Records indicate that Mr. Haevischer was not a difficult inmate to manage. Bi-weekly RCMP task action reports from April 16, 2009 to May 21, 2010 which documented RCMP communications with B.C. Corrections regarding Mr. Haevischer each identically read that the RCMP is "not aware of any significant information or issues of concern in relation to Cody Haevischer (DOB:) while in custody."
- [70] The foregoing conditions of confinement had deleterious effects on Mr. Haevischer's physical and mental health. After approximately one month in segregation, Mr. Haevischer began having difficulty telling one day from the next, and he feared he would never be able to speak with his family, particularly his daughter, again. Further:

While in segregation, Mr. Haevischer witnessed other inmates eat their feces, heard them scream constantly and listened to many others bang on the doors of their cells. Mr. Haevischer believed that the other inmates were once like him and slowly lost their mental abilities while in segregation. He found himself constantly thinking about how long he could last before he, too,

began acting irrationally. While Mr. Haevischer believes that some of the behaviour he witnesses was the result of pre-existing mental conditions, he continued to fear that he would lose his mental faculties if he remained in segregation.

[71] Mr. Haevischer experienced high anxiety, stress and insomnia due to the extreme conditions of his confinement. He was particularly affected by being cut off from the world with no idea when his isolation would end. Medications were not effective in controlling his symptoms.

[72] Mr. Haevischer continues to suffer from anxiety as a result of the time he spent in segregation. He also suffers from various side effects of his anti-anxiety medication, including painful gynecomastia.

(b) Mr. Johnston

[73] Mr. Johnston's custodial circumstances were similar.

[74] At the time of his arrest on the Surrey Six charges in early April 2009, Mr. Johnston was already in custody at the Fraser Regional Correctional Centre [Fraser] on another matter. He had been housed in the general population but was moved into segregation upon his subsequent arrest.

[75] For the next eight months, Mr. Johnston was handled differently from the vast majority of inmates at Fraser. He was kept alone in a small cell for 22 or 23 hours each day. He was permitted out of his cell for one hour per day but that hour was never scheduled and he spent it in another small, cell-like room. Depending on his behaviour and what else was going on in the facility at the time, he might also be allowed an hour of exercise time.

[76] For all intents and purposes, Mr. Johnston was cut off from the world. He was denied phone access to anyone other than his counsel. He was not permitted visits, other than his brother who visited a few times only. He was denied visits from people he asked to be permitted to see who were unrelated to the RS or to the Surrey Six investigation. Mr. Johnston's mail was delayed and interfered with. He was denied access to radio, television and other means of communication. He was not allowed any reading material. The window in his cell was spray painted black for the first number of months so he had no natural light. The light in his cell was on continually from 7 a.m. to 10 p.m. and he was on camera 24-hours per day. Mr. Johnston was denied basic hygiene supplies such a toothbrush for three weeks.

[77] After eight months at Fraser, Mr. Johnston was transferred to Surrey Pre-trial where he was again held in segregation, though conditions were marginally improved. He was still unable to communicate with fellow inmates or have visitors, but he was permitted a television and radio, and his window allowed some natural daylight to come through.

[78] As with Mr. Haevischer, Mr. Johnston was moved into general population within one day of the release of the Bacon judgment.

[79] As a result of his prolonged placement in segregation, Mr. Johnston suffered rapid declines in both his psychological and physical health. He was overcome by feelings of hopelessness, depression, panic attacks, and a sense that he was losing his grip on sanity. At times he would find himself singing and talking to himself. Mr. Johnston sought medical care and received medication for depression and mood disorder. He also deteriorated physically, losing a total of 40 pounds. He was monitored for unusually high blood pressure, and was placed on medication as a result.

(c) Conditions of Confinement were Directed by Police

[80] Both Applicants say that the evidence will establish that the conditions of their confinement were directed by the police.

[81] Mr. Johnston says that during an investigational briefing on March 30, 2009 - the eve of his arrest -- Supt. Robin directed that the police "need to keep MJ in segregation -- need to keep him there".

[82] Mr. Haevischer has filed a number of communications, both internal to B.C. Corrections and between B.C. Corrections and the RCMP, which he says clearly demonstrate that B.C. Corrections was taking direction from the RCMP. Mr. Haevischer advises that he has yet to receive full disclosure from B.C. Corrections regarding his conditions of confinement so also relies on communications which McEwan J. quoted in his judgment in this regard.

[83] I will not review all of the materials Mr. Haevischer relies upon but will set out a sample of them to provide the general tenor of the evidence he proposes to tender.

[84] On April 5, 2009, a prison official sent a communication to Surrey Pre-Trial staff which read, in part:

On Monday we expect to get three inmates from the rival Red Scorpions gang. Cody Haevischer, Matthew Johnston and [redacted] will be coming in separately. [Redacted] is in lock up and is expected first. Later we will get the others. But they should all be here by 22:00

The police have asked that they all remain separate from each other and other inmates. It seems the courts are also asking for a no contact.

[Emphasis added.]

[85] On April 6, 2009, Surrey Pre-Trial's Deputy Warden sent the following message to the facility's managers:

I/M Bacon has now been charged with murder, admitted and placed in seg.

The RCMP have requested that I/M Bacon's ICCS access be limited to legal/privileged calls only for the time being. They are very concerned about the protection of witnesses as the disclosure of their case unfolds over the next few days. They know that I/M Bacon's "reach" can be quite far while he is in here, so they are trying [to] put some controls in place.

I will be circulating updated gang information as it becomes available.

[Emphasis added.]

[86] While this communication relates to Mr. Bacon, Mr. Haevischer suggests that a parallel communication likely exists in relation to him but that he has not yet received it as his disclosure is so far incomplete.

[87] On April 8, the Deputy Warden emailed Surrey Pre-Trial managers and supervisors to advise:

I have just met with members of IHIT (Integrated Homicide Investigation Team) and the DW Ops from NFCP and FRCC. I have received additional information that will assist in the ongoing management of these inmates. This information is confidential and is not to be shared outside the leadership team.

[paragraph redacted]

Cody HAEVISCHER - He is enforcer for the Bacon Brothers/Red Scorpion gang. He is very much a thug and will make every attempt to intimidate or coerce witnesses. For this reason he is not to have access to any calls except privileged/legal ones. He should be assessed to see if he might be a suicide risk as there have been bouts of depression. He is at significant risk to him and is not to have contact with any other inmate. Is addicted to Oxycontin, which is a pain medication.

[88] Mr. Haevischer relies on this communication not only as an example of the degree of direction the police gave B.C. Corrections officials, but also for the fact that it was well known to both IHIT and correctional officials that he might be a suicide risk but that no precautions were taken in that regard.

[89] On April 21, the Deputy Warden emailed Supt. Robin and Sgt. Joe Sobotin to request the following information:

John/Joe - Last week during our call you had stated that you would provide us with formal information (letter) advising us of the risk to public safety should Bacon, [redacted] have access to visits/phones in terms of attempting to coerce, intimidate or coordinate a strike on the witnesses testifying abasing them. We have restricted their calls since April 6th and have restricted their visits since April 15th. We are expecting to be challenged on this and since the pressure is increasing we need to document/demonstrate how we formed "reasonable grounds". [Emphasis added.]

[90] The following day, the Deputy Warden advised the Warden of Surrey Pre-Trial that "[t]he RCMP will be providing us written reasons (this week) for their request to restrict visits to verify the risk that exists." Several days later on April 27, Supt. Robin sent a memo to three deputy wardens which explained, in part, as follows:

Intelligence gathered throughout this investigation indicates that BACON, HAEVISCHER and JOHNSTON are at risk from a number of rival crime groups, including several murder contracts that are still believed to be outstanding. Due to the fluid memberships of these crime groups, it is difficult to identify who are allies and who are enemies. It is also known the BACON/Red Scorpion crime group itself is fractured with members turning on each other. Investigators believe that risk of violence to BACON, HAEVISCHER and JOHNSTON by unknown rivals is high.

Members associated to the Red Scorpion crime group have attempted to locate witnesses, through surveillance and contacts. Investigators are concerned that unrestricted access to visitors and phones will allow BACON, HAEVISCHER and JOHNSTON to contact witnesses, to intimidate and potentially harm them. This matter is still under investigation and some witnesses and family members still need to be located, threat assessments conducted and measures to protect them put in place.

This situation will continue to be monitored and we will advise of any changes in the assessed level of risk.

[91] On May 6, a Corrections official made the following inquiry of the RCMP:

The lawyers are starting to push on the visit and phone restrictions on the three. Do you still believe there [are] concerns the three are still trying to intimidate/harm witnesses and family members. Has there been a recent update to your threat assessment? Can you give Corrections any new information to support our current restrictions on the three inmates?

[92] The RCMP response was:

We will discuss further but will like to have restrictions in place as we know they will try and intimidate witnesses and we are continuing to approach more people as witnesses.

[93] Other emails indicate that it was the RCMP who approved Mr. Haevischer eventually having telephone contact and visits with his daughter, and that B.C. Corrections and the RCMP liaised with respect to freedom of information requests relating to the Applicants. The materials further indicate that weekly conference calls were held between B.C. Corrections officials, the RCMP and Crown counsel to exchange intelligence and review the confinement restrictions of the Applicants and Mr. Bacon.

[94] Both Applicants say that the police were intimately aware of the psychological deterioration that accompanies prolonged segregation because of their ongoing involvement with Person X and Person Y during the 2009-2010 period.

[95] In October 2009, Supt. Robin communicated to the Warden of Atlantic Institution that Person X's mental health was deteriorating because of his placement in segregation for, at that time, just over one month (for breaching prison rules). He requested that the Warden provide special visits and privileges unavailable to others in segregation, and the Warden agreed. Moreover, the police went to great lengths to further ameliorate Person X's conditions of confinement. They obtained a spring order, and from December 6, 2009 to

January 21, 2010, housed Person X in local hotels, including the luxury Pan Pacific. The police brought him visitors, including family members and girlfriends.

- [96] The Applicants further say that despite the stated rationales for their treatment, the treatment of other high profile gang members who were also in remand differed markedly. For example, seven members of the UN Gang, who were charged with conspiracy to murder RS members, were not in separate confinement, although all or some of them had been when initially admitted.

ii. The Bacon Judgment

- [97] Mr. Bacon was arrested in relation to the Surrey Six murders on April 3, 2009, the same day as Mr. Haevischer and Mr. Johnston. The three men were originally charged on the same indictment. Mr. Bacon, like the Applicants, was immediately placed in administrative segregation. On September 11, 2009, he brought an application for habeas corpus seeking release into the general population. The reasons of McEwan J. were published on June 9, 2010.
- [98] Justice McEwan described the conditions of Mr. Bacon's confinement, which were similar to those of the Applicants summarized earlier. Upon presentation at Surrey Pre-Trial -- and despite the fact that he had not been a management problem when at the facility on earlier remands, and was assessed not be a risk of violence -- he was immediately placed in segregation. His cell was filthy and smeared with blood, feces and mucus. The bedding was inadequate and was not changed for the five weeks he was housed in the cell. The lights were on 24 hours per day. They could be dimmed to some degree at night but that happened only at the discretion of the guards. There was a video camera in the cell. He was not permitted a pen for the first month.
- [99] Mr. Bacon was kept in his cell for 23 hours a day; he was permitted into another small room alone for the other hour. His one hour out of his cell, the timing of which was random, was his only opportunity to shower and contact his legal counsel. Mr. Bacon was not permitted to call anyone else; he was advised that was because there were reasonable grounds to believe that unrestricted telephone access might "endanger him or another person". His visits were also initially restricted to legal counsel. After about six weeks, he was told that the police had given the institution permission to allow his parents to visit, but no one else. Mr. Bacon's correspondence was read by Corrections staff and was delayed in being forwarded to him. A number of his letters had been provided to the RCMP.
- [100] Mr. Bacon was moved to a different cell when Mr. Haevischer was moved into his former cell. The new cell had a shower and radio. He was eventually allowed a television.
- [101] The Applicants rely on a number of findings of McEwan J., including the following:

- a) The documentary record demonstrated a "remarkable degree of integration with the police", the result of which was particularly harsh treatment for Mr. Bacon, even compared to others of similar status [para. 199].
- b) Mr. Bacon's initial placement in segregation "was guided by the police estimation of his culpability relative to others admitted at the same time. The decision to place [Mr. Bacon] in separate confinement was police-driven" [para. 257].
- c) There was no systematic attempt to provide Mr. Bacon with the standard of treatment of an ordinary remand prisoner, to which he was entitled despite being housed in segregation. "Rather he was treated as a prisoner who was being perpetually punished: the only practical effect of the distinction between 'separate confinement' and 'segregation' was that by applying the semantic fiction of 'separate confinement' for 'protective' purposes the deprivations could go on indefinitely:" [para. 259].
- d) Because the Warden inappropriately substituted a test of what Mr. Bacon might do in place of the tests set out in the governing legal framework, and substituted "police-driven media reports" for evidence, Mr. Bacon was "left in a position where he was unable to demonstrate adherence to any achievable standard in order to work his way out of the restrictions imposed upon him" [para. 265].

[102] The Applicants also rely on the statements of McEwan J. with respect to the norms for the treatment of prisoners and the recognition that solitary confinement has profoundly deleterious effects on those subject to it. With respect to international norms, they emphasize, in particular, McEwan J.'s statements at paras. 277-278 with respect to solitary confinement:

The international community has commented specifically on the issue of solitary confinement. There are several definitions of "solitary confinement" but the consensus is that it is the act of physically isolating prisoners by confining them alone in their cells for 22 or more hours per day. The Istanbul statement on the use and effects of solitary confinement, adopted December 9, 2007 at the International Psychological Trauma Symposium, offers the following definitions:

Solitary confinement is the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day. In many jurisdictions prisoners are allowed out of their cells for one hour of solitary exercise. Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are often not empathetic.

The international community recognizes that the effects of solitary confinement may extend not only to matters of an inmate's health and well-being, but, with respect to pre-trial incarceration, to prejudice to due process itself.

[103] At para. 279, McEwan J. quoted from the Interim Report of Manfred Nowak the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to the 63rd session of the United Nations on July 28, 2008. The Interim Report said the following with respect to the effects of solitary confinement:

It has been convincingly documented on numerous occasions that solitary confinement may cause serious psychological and sometimes physiological ill effects. Research suggests that between one third and as many as 90 percent of prisoners experience adverse symptoms in solitary confinement. A long list of symptoms ranging from insomnia and confusion to hallucinations and psychosis have been documented. Negative health effects can occur after only a few days in solitary confinement, and the health risks rise with each additional day spent in such conditions.

Individuals may react to solitary confinement differently. Still, a significant number of individuals will experience serious health problems regardless of the specific conditions, regardless of time and place, and regardless of pre-existing personal factors. The central harmful feature of solitary confinement is that it reduces meaningful social contact to a level of social and psychological stimulus that many will experience as insufficient to sustain health and well-being.

[104] With respect to Canadian norms, the Applicants rely on the endorsement by McEwan J. of the statements made by the Honourable Louise Arbour, Commissioner, in the Commission of Inquiry into Certain Events at the Prison for Women in Kingston (Ottawa: Canada Communication Group, 1996), a report submitted to the Solicitor General of Canada. Her comments concerning the impact of prolonged segregation on prisoners are reproduced at paras. 284-289 of Bacon. The Applicants highlight the following passages in which the Commissioner commented on the punitive nature of prolonged segregation and the impact on prisoners of its indefinite nature (at para. 285):

The prolonged segregation of the inmates and the conditions and management of their segregation was again, not in accordance with law and policy, and was, in my opinion, a profound failure of the custodial mandate of the Correctional Service. The segregation was administrative in name only. In fact it was punitive, and it was a form of punishment that courts would be loathe to impose, so destructive are its consequences.

The most objectionable feature of this lengthy detention in segregation was its indefiniteness. The absence of any release plan in the early stages made it impossible for the segregated inmates to determine when, and through what effort on their part, they could bring an end to that ordeal. This indefinite hardship would have the most demoralizing effect and, if for that reason alone, there may well have to be a cap placed on all forms of administrative segregation.

[105] With respect to the importance of the rule of law in protecting prisoners' rights, the Commissioner said, in part, the following (at para. 287):

Ultimately, I believe that there is little hope that the Rule of Law will implant itself within the correctional culture without assistance and control from Parliament and the courts. One must resist the temptation to trivialize the infringement of prisoners' rights as either an insignificant infringement of rights, or as an infringement of the rights of people who do not deserve any better. When a right has been granted by law, it is no less important that such right be respected because the person entitled to it is a prisoner.

Respect for the individual rights of prisoners will remain illusory unless a mechanism is developed to bring home to the Correctional Service the serious consequences of interfering with the integrity of a sentence by mismanaging it. The administration of a sentence is part of the administration of justice. If the Rule of Law is to be brought within the correctional system with full force, the administration of justice must reclaim control of the legality of a sentence, beyond the limited traditional scope of habeas corpus remedies.

[106] At para. 289, McEwan J. quoted the Commissioner's comments concerning the effects of segregation with reference to the federal statute which parallels the terms of the Correction Act, S.B.C. 2004, c. 46 applicable to them. In particular, the Applicants highlight the following:

Michael Jackson has described solitary confinement as "the most individually destructive, psychologically crippling and socially alienating experience that could conceivably exist within the borders of the country". During the Commission's Phase II consultations, many participants spoke of the pain, anxiety and desperation which is experienced by inmates placed in segregation. Some of my earlier findings are consistent with these experiences and opinions.

[T]here is a body of clinical literature which supports the view that the effects of long-term segregation on prisoners are deleterious to their mental health. Grassian concluded from his research on inmates that "rigidly imposed solitary confinement may have substantial psychopathological effects and these effects may form a clinically distinguishable syndrome." In that study, he found the inmates suffering from, among other things, perceptual distortions such as hallucinations, affective disturbances such as massive anxiety, difficulties thinking, disturbances in thought content, problems with impulse control and rapid subsidence of symptoms on termination of isolation. Similarly, Benjamin and Lux found evidence from the experience of prisoners and prison psychologists, of damage in the form of cognitive impairment (e.g. concentration, memory, hallucinations) and emotional impairment (feelings of hopelessness, depression, rage and self-destructiveness) as a result of detention in solitary confinement.

[107] Finally, the Applicants submit that the comments of McEwan J. at para. 292 with respect to Mr. Bacon apply equally to them given their analogous treatment:

[Mr. Bacon] is kept in physical circumstances that have been condemned internationally. He is locked down 23 hours per day and kept in the conditions Professor Haney described as "horrendous". These conditions would be deplorable in any civilized society, and are certainly unworthy of ours. They reflect distressing level of neglect. On top of this, [Mr. Bacon] is only allowed out at random times. He is denied almost all human contact. His treatment by the administration and the guards is highly arbitrary and further accentuates his powerlessness.

[108] Justice McEwan found the treatment of Mr. Bacon to be contrary to both s. 12 and s. 7 of the Charter. With respect to s. 12, he stated (at para. 317):

[Mr. Bacon's] incarceration started with an essentially arbitrary consignment to separate confinement. The conditions of his confinement were radically exacerbated almost at once when he was cut off from any outside contact. The importance of such contact to the mental health and well-being of any person is hardly controversial. Indeed, even the [Warden's] submission accepts that whether or not solitary confinement, in itself, is cruel and usual punishment depends on what "compensating efforts are made by the correctional authorities".

He concluded that the blanket deprivations added to Mr. Bacon's solitary confinement constituted a breach of s. 12.

[109] As for s. 7, McEwan J. held that apart from solitary confinement, additional isolating deprivations had been imposed on Mr. Bacon for an improper purpose. As he reasoned, "[w]hen the basis for the deprivation is 'the police believe you might try something', and paper reviews are conducted on the mantra that 'they still think so', there can be no semblance of fundamental justice" (at para. 322). Justice McEwan further concluded that Mr. Bacon had been deprived of all residual liberties including reasonable access to counsel and a reliable expectation of confidentiality on the occasions when access takes place.

[110] The Applicants submit that these conclusions of law apply in equal measure to them.

D. Conclusions concerning the Applicants' Conditions of Confinement

[111] It is clear from the documentary record on this application that the RCMP advised B.C. Corrections that both Applicants had been assessed as physically at risk from rival gang members, and as posing a threat to witnesses associated to the investigation, and on that basis should be treated as inmates who must be segregated from the general population. B.C. Corrections acted upon the advice of the RCMP in that regard. Whether Corrections ought to have taken such direction from the RCMP was the subject of comment by McEwen J. in Bacon. At para. 46, he observed:

The police are agents of the state authority that is investigating and prosecuting the accused. The court stands between that manifestation of the state and the accused. Where the law mandates that the accused be kept in custody, the jailer operates under the supervision of the court. Keeping remand prisoners "safe" includes keeping them in circumstances where they are not subjected to the direction of or supervision of the police.

[112] Later, after reviewing B.C. Corrections' communications, he noted that they demonstrated a "remarkable degree of integration with the police, even to the extent that the [Warden] does what the police want first and waits for justification later" (at para. 199).

[113] The Applicants submit that it is not only the impact of the communications between the RCMP and B.C. Corrections on their conditions of confinement that is relevant, but the fact of the communications themselves. They allege that the police directed B.C. Corrections to place them in segregation as part of the overall investigative strategy to isolate them for purposes of frustrating their access to counsel and others, and making them more vulnerable to police interviews. In this respect, they rely on the following conclusion of McEwen J. at para. 299 of Bacon:

When the judiciary delivers a person to the jailer with a direction to keep him "safe", the mandate obviously includes protecting health in mind and body. It means that his or her residual rights will be respected. While the content of such rights is not precisely defined, it certainly includes the "privileges" set out in s. 2 of the Correction Act Regulation. It also includes the right to a fair trial and to treatment that ensures that a fair trial is possible. This means that an inmate is not held so that the police can improve their case, or so that Corrections can, without the nuisance of judicial authorization, assist them. An inmate is a person with positive rights to counsel, to approach witnesses, and to prepare his case unimpeded by rules or practices having the effect of frustrating such access. It is truly shocking that a facility called a PreTrial Services Centre has no accommodation for reasonable communication with lawyers (i.e. privacy, desks, telephones, paper) during ordinary business hours. It is scandalous that the staff, willingly and unlawfully abet the police in their investigative objectives. It is difficult to imagine a less even-handed system than [that] which the respondent currently administers.

[114] For purposes of this Vukelich application, I accept all of the factual allegations of Mr. Haevischer and Mr. Johnston, as described above, with respect to the custodial conditions under which they lived for the 14 months of their segregation from the general population. I also accept, for purposes of this application, the findings of fact and conclusions of law made by McEwen J. in Bacon on which the Applicants rely.

[115] In addition to being segregated from the general population, the Applicants were denied ordinary contact with family and friends. They were held in segregation on a basis that, in the words of McEwen J., "rendered recourse to due process within the institution meaningless, even if it were available"; and left them in a position where they were "unable to demonstrate adherence to any achievable standard in order to work [their] way out of the restrictions imposed on them" (at para. 291).

- [116] I accept that for at least the first several months, both Mr. Haevischer and Mr. Johnston were kept, again in the words of McEwen J. (at para. 292) "in physical circumstances that have been condemned internationally" and which "reflect a distressing level of neglect". There was no systematic attempt to provide them with the standard of treatment of ordinary remand prisoners to which they were entitled despite being housed in segregation. Thereafter, their continued segregation for many more months contravened both international and Canadian norms for the treatment of prisoners. As inmates in segregation, they did not receive the systematic review and medical support contemplated by the Correction Act and Correction Act Regulation, B.C. Reg. 58/2005 amplified by the Adult Custody Policy Manual, the terms of which were set out by McEwan J. in Bacon at para. 218.
- [117] Further, I accept that because of the conditions of their confinement over those 14 months, both Applicants suffered physically, emotionally and psychologically in the manner and to the extent they have described in their application materials.
- [118] Given the length of time the Applicants were held in solitary confinement, and the conditions of their confinement during those 14 months, I accept, as held by McEwen J. with respect to Mr. Bacon, that their s. 7 and s. 12 Charter rights were violated during that time.

IV. ANALYSIS

- [119] It is the position of the Applicants that the evidence they propose to lead regarding the conditions of their confinement, when considered in light of McEwan J.'s reasons, establishes an abuse of process which is alone sufficient to justify a judicial stay of proceedings notwithstanding the serious charges of which they have been found guilty. When considered with the proposed evidence regarding the other police misconduct and the Amici's in camera submissions, they say that they have amply established a foundation for a stay sufficient to entitle them to proceed to an evidentiary hearing to fully put their case before the Court.
- [120] I have issued sealed reasons regarding the ex parte portion of this Vukelich application in which I accept that certain information raised by the Amici augments the Applicants' claims for a stay. I am precluded by the privileged nature of the information from saying anything further. However, I have taken that information into account and considered the state conduct in both the open and ex parte portions cumulatively in the Babos analysis that follows.

A. The First Stage: Preventing Ongoing Harm to the Justice System

- [121] To reiterate, the first stage of the Babos analysis looks at whether the state has engaged in conduct that is offensive to notions of fair play and decency such that proceeding with the trial in the face of that conduct would be harmful to the integrity of the justice system. Even if proceeding with the trial would not necessarily manifest, perpetuate or aggravate the prejudice in question, the Court must still consider whether proceeding would lend judicial condonation to the impugned conduct.
- [122] As I have already indicated, I accept for purposes of this application that the length and conditions of the Applicants' segregated confinement from April 2009 until June 2010 violated their rights under the Charter for the reasons set forth in McEwan J.'s judgment upon which the Applicants rely. As McEwan J. found, B.C. Corrections officials abdicated their responsibility for the proper placement of the Applicants by taking direction from the RCMP. Both Applicants suffered physically, emotionally and psychologically in the manner and to the extent they have described in their application materials. There is certainly a basis to conclude that state conduct in relation to the Applicants' conditions of confinement was offensive to notions of fair play and decency, and an abuse of process.
- [123] I am not so persuaded with respect to all of the other alleged police misconduct. Starting with the moving witnesses strategy, Insp. Adam recognized in his will say that the strategy was aggressive and unorthodox, and was likely to attract criticism from defence counsel. And he was right. However, he observed that the investigative team believed the strategy was necessary because any potential witnesses were RS members or individuals associated to them, and therefore hostile to the police. The task of convincing them to cooperate was daunting and necessitated an unorthodox approach. Nothing in the Applicants' facts as alleged supports the proposition that the means and objectives of the moving witnesses strategy or the adoption of that approach was abusive and shocking to the conscience of the community.
- [124] While the facts as alleged do not establish a direct connection between the moving witnesses strategy and the misconduct of the four officers, I am prepared to assume that the effect of the strategy was to encourage an "anything goes" attitude on their part. The misconduct of the officers was unquestionably egregious. They engaged in exploitative sexual relationships with protected female witnesses, endangered their safety by revealing protected information about them to others, lied to their superiors, and manipulated overtime and expense claims to cover up their conduct. The misconduct of these officers as alleged could constitute an abuse of process and conduct offensive to fair play and decency.
- [125] The alleged facts concerning the other impugned investigative practices reflect, to some extent, the aggressive tenor of the moving witnesses strategy. I include here the police decision to reveal detailed information to prospective witnesses in the form of PowerPoint presentations. While the practice was unorthodox, and may have had the potential to risk witness tainting, I concluded at trial in the context of K.M.'s evidence that it was

undertaken by the police to persuade her that cooperation was her best -- and perhaps only -- option. As I stated in my reasons for judgment (indexed as 2014 BCSC 1863), the police had legitimate reasons for showing her the information and her testimony was not influenced by the practice.

- [126] I also include the police interview techniques or approaches used in relation to G.M. and Person X's girlfriend. I accept that G.M.'s perception was that the interviewing officers wanted to hear a particular version of events and that he complied because he wanted the interviews to end, but I do not accept that the questioning as alleged by the Applicants could be characterized as coercive. The suggestion to the girlfriend of Person X to the effect that he may wish to explain to police that he had been told to commit murder "or else" was presumably a strategy used to show empathy or understanding for Person X's position to encourage him to cooperate, but it is not a strategy that could be described as offensive to notions of fair play and decency.
- [127] I do not include the allegation that the police improperly handled as an informant a person the Court later concluded was not. The Court's ruling indicates that there was a legitimate legal issue to be resolved as to whether that individual was a confidential informant.
- [128] I am not satisfied that, even considered cumulatively, there is a basis to conclude that the foregoing impugned investigative practices could amount to an abuse of process. This remains the case even if the allegations regarding financial and file mismanagement are further added to the mix. As the various reviews disclosed, the problems identified were inadequacies and shortcomings in a long and challenging investigation that was for considerable periods of time lacking in sufficient resources and technical support. While these may well have impeded the progress of the investigation, they do not amount to an abuse of process.
- [129] Thus, the state misconduct which could be found to constitute conduct offensive to notions of fair play and decency consists of that relating to (i) the Applicants' conditions of confinement and (ii) the misconduct of the four investigating officers.
- [130] I am satisfied that there is no basis to conclude that either category of misconduct would be manifested, perpetuated or aggravated through the entering of the Applicants' convictions in this case.
- [131] With respect to the conditions of confinement, McEwan J.'s judgment in Mr. Bacon's habeas corpus application had its intended effect. The response of B.C. Corrections to the judicial condemnation of Mr. Bacon's conditions of confinement was swift. It is apparent that B.C. Corrections officials understood and accepted its application to the circumstances of Mr. Bacon's co-accused who were incarcerated in similar circumstances: Mr. Haevischer and Mr. Johnston were immediately removed from segregation and placed in the general population of their respective institutions. They have remained in the general population since June 10, 2010.

- [132] As for the misconduct of the four officers, the state has taken decisive action to disassociate itself from their behaviour. Following an investigation into the matter by an outside police agency, the officers were suspended from RCMP duties in 2010. All four were also criminally charged in relation to their conduct, and the allegations against them will be canvassed fully in the criminal process.
- [133] Nevertheless, as Moldaver J. observed in *Babos* (at para. 38), the distinction between ongoing and past misconduct does not completely resolve the question of whether proceeding with the prosecution will occasion further harm to the justice system. The question therefore remains whether proceeding to enter the convictions of the Applicants in light of the conduct as alleged would be harmful to the integrity of the justice system. For the purposes of the Vukelich application, I am prepared to accept that the answer to this stage one question is "yes".

B. The Second Stage: Alternate Remedies

- [134] At the second stage, the question is whether any remedy short of a stay is capable of redressing the prejudice. As it is the residual category of abuse of process that is invoked by the Applicants, any remedy must be directed to the prejudice to the integrity of the justice system.
- [135] The Applicants submit that in the circumstances of this case, the only appropriate remedy -- and the only remedy they seek -- is a stay of proceedings.
- [136] For purposes of the Vukelich application, I accept that no remedy short of a stay is capable of redressing the prejudice to the justice system from the alleged misconduct.

C. The Third Stage: Balancing

- [137] The third stage of the analysis entails balancing and requires the Court to address the following question: is the seriousness of the state misconduct disproportionate to the societal interest in having the Applicants' convictions entered?
- [138] As set out in *Babos*, factors that inform this inquiry include: the nature and seriousness of the state misconduct; whether the misconduct is isolated or reflects a systemic or ongoing problem; the circumstances of the accused; the seriousness of the charges against the accused; and the interests of society in having the convictions entered and the Applicants sentenced.
- [139] The weight to be attached to each of the factors, including the seriousness of the offences, is a matter for the Court to determine in the circumstances of the particular case: *R. v. S.B.*
- i. The state misconduct (nature and seriousness; isolated or systemic)
- [140] Both categories of state misconduct were extremely serious.

- [141] The misconduct involving the four officers was sufficiently egregious that each now faces multiple criminal charges, including for obstruction of justice, breach of trust and fraud.
- [142] As observed by Moldaver J. in *Babos* (at para. 64), context is essential in considering the seriousness of the misconduct. In the context of the present case, the seriousness of the misconduct is tempered in this respect: once their actions were discovered, the officers were suspended from the RCMP. None of the officers continued to be involved in the E-Peseta investigation and none testified at trial. Nor did the Crown call either of the protected female witnesses at trial. Whether or not the misconduct could be described as systemic, in that it went beyond a rogue officer and implicated four, these steps indicate that the misconduct is not ongoing; rather, it was promptly and severely dealt with.
- [143] The Applicants' conditions of confinement for their first 14 months in remand were harsh in the extreme. Their treatment was contrary to the Charter and to international human rights treaties to which Canada is a signatory; it was also in breach of B.C. Corrections' own standards for the treatment of inmates. As held by McEwan J. in *Bacon*, B.C. Corrections acted on the directions of the RCMP in the placement of the Applicants in solitary confinement and in keeping them there for an extraordinary period of time.
- [144] At the same time the Applicants were enduring these harsh conditions, the police recognized the impact of solitary confinement on the health and well-being of Person X, and took special measures to ameliorate his conditions. Person X was, at the time, an admitted multi-murderer serving a life sentence for his role in the Surrey Six murders. The Applicants were both accused persons awaiting trial and presumed innocent.
- [145] The misconduct was serious, prolonged and systemic. It is not, however, ongoing. Once McEwan J.'s reasons were published in June 2010, the Applicants were immediately moved into the general population of their institutions. Those reasons constitute a judicial rebuke in the strongest of terms of the spectrum of state conduct during those 14 months. With the release of the *Bacon* judgment, the Court dissociated itself from the conduct. With these Reasons, it will continue to do so.
- [146] Finally, to reiterate, I have also taken into account the information raised by the Amici in the ex parte portion of this Vukelich application which augments the Applicant's claims for a stay.

ii. Circumstances of the Applicants

- [147] While the criminal misconduct of the four investigating officers had no direct impact on the Applicants, it goes without saying that the deprivations they suffered for the many months they were in segregation had an immediate and significant detrimental impact on the physical and mental health of both men. Some of those effects have continued since their release into the general population.

iii. Seriousness of the offences and interest of society in having the convictions entered

- [148] The Applicants have been found guilty of horrific crimes. The seriousness of the offences is of the highest order: six counts of first degree murder and one count of conspiracy to commit murder.
- [149] The circumstances of the offences could not be more shocking. The murders were execution-style killings, carried out with deliberation while the six victims were defenceless. The murder of Corey Lal was driven by the motive of a gang to demonstrate its strength, instill fear in rival gangs, and expand its drug business. The Applicants executed the other five victims to avoid detection as the perpetrators of Mr. Lal's murder.
- [150] In light of the number of victims and the motivation underlying the murders, society's interest in seeing justice done on the merits of this case is profound. Society's interest weighs all the more heavily in the context of this case because the carnage was the result of gang members fighting for turf in the illicit drug trade. Moreover, the Applicants chose to go to the Balmoral Tower, an apartment building which is home to hundreds of residents, and to settle their score with Mr. Lal on the doorstep of those residents. They were apparently undeterred by the prospect of imperilling anyone caught in the cross-fire. The result was the murder of six persons.
- [151] The surviving victims of these crimes are the families of the six men who were executed, and their interest in seeing convictions entered for these crimes is equally profound.
- [152] As observed by the Ontario Court of Appeal in *R. v. Zarinchang*, 2010 ONCA 286 at para. 60 (cited by Moldaver J. in *Babos* at para. 43), balancing is particularly important where the residual category is in issue for the following reason:

In some cases, an accused who is granted a stay under the residual category realizes a windfall. Thus, it is important to consider if the price of the stay of a charge against a particular accused is worth the gain. Does the advantage of staying the charges against this accused outweigh the interest in having the case decided on the merits?

- [153] In the circumstances of this case, the seriousness of the charges and society's interests in seeing justice done are the factors that weigh most heavily in the balance. I am satisfied that the price of staying these convictions could not be worth the gain to our justice system. When the impugned state misconduct is weighed against society's interest in entering the convictions in this case, this is not one of the "clearest of cases" where the exceptional remedy of a stay of proceedings would be warranted.

V. CONCLUSION

- [154] The issue to be determined on this Vukelich application is whether the Applicants have established that an evidentiary hearing will assist the Court in determining the merits of their application for a stay of proceedings.

[155] I have assumed for the purposes of the Vukelich application that the facts as alleged by the Applicants are true. Having done so, I conclude that the grounds advanced by the Applicants could not support a stay of proceedings. An evidentiary hearing is unnecessary, as I am satisfied that even if the Applicants' case is taken at its highest, a stay of proceedings would be a disproportionate response in light of the seriousness of the offences committed by the Applicants and the interest of the community in the entry of their convictions.

[156] Accordingly, the applications for a stay of proceedings are dismissed. The convictions of the Applicants will now be entered, and a date will be set for their sentencing.

The Honourable Madam Justice C.A. Wedge

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